No. 22443

In the

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR, his wife, surviving parents of FELIX MATTHEW DORR, deceased, et al,

Appellees.

Appellant's Reply Brief

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Reply to Brief of Appellees Dorr

OUTLINE OF ARGUMENT

1. This appeal is not contrary to Appellant's announced position.

2. A substantive due process challenge to the Arizona Financial Responsibility Act, as here applied, has never been heretofore made.

3. State Court decisions are not binding on this court on Federal questions.

4. A legislative enactment may be constitutional in one application and unconstitutional in another application.

5. Imposing liability on Appellant on the claim of public policy—police power violates the equal protection clause of the 14th Amendment.

ARGUMENT

Appellees are *still* entitled to be paid by Allstate if *Sandoval v. Chenoweth,* 102 Ariz. 241, 428 P.2d 98 stands. This appeal is taken for the express purpose of striking down *Sandoval* as an unconstitutional application of the Financial Responsibility Act. Thus, Appellees' claim (made with much emotional fervor) that this appeal is contrary to the statement of the undersigned (Appellees' Brief, pp. 1-2) ignores the import of this appeal.

Sandoval v. Chenoweth, supra, applied the following portion of Section 28-1170 F., Arizona Revised Statutes, to a non-certified policy of automobile insurance:

> "'1. The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs. The policy may not be cancelled or annulled as to such liability by an agreement between the insurance carrier and the insured after the occurrence of the injury or damage, and *no statement made by the insured* or on his behalf and no violation of the policy shall defeat or void the policy.'" (Emphasis added by author.)

This author does not now conceive, nor did he at oral argument before the District Court conceive of any way the Federal District Court Judge could follow the law as set down in *Sandoval* and find for Allstate. The point is, as Appellee's brief attempts to obfuscate, that *Sandoval* should not be followed because it is unconstitutional.

An oversimplified statement of Allstate's position on this appeal is as follows: (1) The right to contract is protected

by the U. S. 14th Amendment. (Appellant's Brief, pp. 7-8) (2) The right to contract includes the right to avoid contracts induced by fraud. (pp. 10-11) (3) Infringement of 14th Amendment rights is permitted in the exercise of the police power of the state but only if the action bears a "real and substantial relation to the end sought to be accomplished." (pp. 11-12) (4) *Sandoval v. Chenoweth,* supra, and the action of the District Court Judge herein, violate the 14th Amendment because requiring the insurance company to honor a contract void for fraud "is not a reasonable method of accomplishing the ends" sought to be accomplished by the Arizona Financial Responsibility Act. (pp. 6, 10, 12, 13)

Appellees Have Not Cited One Single Case to Justify the Constitutionality of the Financial Responsibility Act as Applied by Sandoval v. Chenoweth, Supra.

Appellees suggest that the question here presented has been raised in *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 380 P.2d 145; *Carpenter v. Superior Court,* 101 Ariz. 565, 422 P.2d 129; and *Sandoval v. Chenoweth,* supra. In fact such suggestion is wholly erroneous. *Jenkins v. Mayflower,* supra, did not consider the constitutionality of anything. *Carpenter v. Superior Court,* supra, said questions of constitutionality were raised by the lawyers, but the opinion never discussed it. (422 P.2d 136) And *Sandoval v. Chenoweth,* supra, discussed *only* procedural due process on the question of notice of the suit, and even then did not decide that question. (428 P.2d 102)

However, whether the State Supreme Court considered substantive due process or not is beside the point.

Where Federal questions are presented, whether involving the Constitution or not, the State Court decisions are

not binding upon the Federal Courts. *Sun Insurance Office, Limited v. Clay,* (USCA 5th) 319 F.2d 505 at 510; *Randel v. Beto,* (USCA 5th) 354 F.2d 496 at 500; *Nixon v. Condon,* 286 U.S. 73, 76 L ed 984 at 990.

The citation of *Sandoval v. Chenoweth,* supra, as establishing the constitutionality of the Financial Responsibility Act when the very issue here is whether the action of the Arizona Supreme Court in that case constituted an unconstitutional application of the statute is more than a little ludicrous.

A further point should here be noted. The Arizona Financial Responsibility Act was held constitutional by the Arizona Supreme Court in *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136. The challenge there was being made by a motorist who had lost driving privileges and by a vehicle owner who had forfeited the vehicle registration, under the provisions of the Act.

This author would concede that the Arizona Financial Responsibility Act was constitutional *as there applied.* However, a legislative enactment may be constitutional in one application and unconstitutional in another application. Such a proposition was announced by the United States Supreme Court in *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 289, 42 S.Ct. 106, 66 L.ed 239 at 243 in the following language:

> "The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another."

An argument which Appellees did not make, but which this author expected them to make (and since they did not,

will be made for them and answered), but which will occur to this Court, is as follows:

The public policy of *Schecter v. Killingsworth,* supra, is to protect persons injured in motor vehicle accidents against the possibility of an absence of compensation for injuries sustained; the further public policy is to avoid the necessity of the public (through the public welfare) supporting and caring for those who are injured on the highways; (this latter argument ignores the possibility of higher premiums paid by the public for insurance to cover such injuries); the conclusion to be drawn from such public policy argument is that: "It is better that the burden of injuries in this situation fall upon the insurance industry than upon the individuals injured."

We will concede that if properly, fairly and reasonably implemented, such a conclusion would be a legitimate statement of public purpose sufficient to invoke the police power to attain those ends.

But where such argument fails is because the means employed by *Sandoval* (as in the instant case) bears no relationship to the public policy argument.

If the insurance industry should bear the cost of damages done by uninsured motorists, and the state is to impose the financial responsibility therefor upon the insurance industry, then the state must apportion those losses between insurance companies in some reasonable manner and not impose the entire loss of an injury upon a company defrauded by a lying applicant! ! !

The equal protection clause of the 14th Amendment requires the *Sandoval* method of apportioning uninsured losses be declared unconstitutional. In *Bilyeu v. State Employees' Retirement System,* 25 Cal.Rptr. 562 at 565, 375 P.2d 442, the Supreme Court of California said:

> "There is no constitutional requirement of uniform treatment, but only that there be a reasonable basis for each classification."

And a similar statement was made in *Garrett v. State,* Conn., 141 A.2d 249, as follows:

> ". . . the equal protection of the laws does not prevent classification so long as it is reasonable, not arbitrary, and rests on a distinction having a fair and substantial relation to the object sought to be accomplished."

It would seem clear that adventitious selection of those insurance companies who are to bear the loss on the basis of having received fraudulent applications cannot be said to have any reasonable relationship to the object sought to be accomplished. Such a haphazard classification surely cannot be said to be reasonable.

Under *Sandoval* the following hypothetical would exist. Companies A, B and C all receive applications on the same day that are wholly fraudulent. The applicant to A company has an accident the morning after the binder has been issued and before any investigation of the risk can be made. A company must therefore bear the entire loss caused by the applicant. The applicant to B company does not have an accident until after B company has acquired notice of the fraud and sent notice of cancellation. B company does not pay anything. The applicant to C company though equally fraudulent does not become involved in an accident. C company, although it never attempts to discover the fraud or to cancel the policy, is not required to pay anything to any person. D company also receives an application on the same day from an honest applicant and is therefore obligated to pay only that which it contracts to pay.

Such a distinction in obligation is not related in any way to the end sought to be accomplished.

If the state desires, it certainly may impose upon all insurance companies the obligation to care for those injured by uninsured motorists. And the state may apportion those losses among various insurance companies if done in accord with the equal protection of the laws provision of the 14th Amendment. But, constitutionally, this selection cannot be left to the applicant who falsely represents facts in his insurance application.

Reply to Brief of Lombardo and Badger Mutual

These parties who claim to be Appellees are interlopers on this appeal. The judgment from which the appeal was taken does not name or in any manner refer to these two parties, (Transcript of Record, page 60) nor did the Notice of Appeal in any way refer to these parties. (Transcript of Record, page 62) It would seem that the brief filed by these parties should be stricken. However, whether it is or not is of no matter since nothing contained in that brief remotely bears upon the constitutional issue here presented.

CONCLUSION

It is respectfully submitted that to prevent all insurance companies writing automobile insurance policies in Arizona from avoiding contracts induced by the fraud of the applicants is not a reasonable method by which to attain the ends of the Arizona Financial Responsibility Act. It is thus further submitted that the decision of the Honorable District Court Judge should be reversed and the court should declare that *Sandoval v. Chenoweth,* supra, to the extent

that it compelled the finding by the lower court, is in violation of the 14th Amendment to the United States Constitution.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

John H. Westover